

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHARLES J. CLARK, JR.

Plaintiff,

V.

**CLARK COUNTY HUMAN RESOURCE
DIVISION, et al.,**

Defendant(s).

Case No.: 2:19-cv-01567-GMN-DJA

ORDER

This matter is before the Court on Plaintiff's Amended Complaint (ECF No. 6), filed on October 16, 2019. The Court previously granted Plaintiff's request to proceed *in forma pauperis* and dismissed his complaint without prejudice for failure to state a claim for relief. (ECF No. 5). He was granted the opportunity to amend and the instant Amended Complaint (ECF No. 6) is ripe for the Court's screening pursuant to § 1915(e).

Federal courts are given the authority to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of the claim

1 showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*,
2 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations, it
3 demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause
4 of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v. Allain*, 478 U.S. 265,
5 286 (1986)). The court must accept as true all well-pled factual allegations contained in the
6 complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 556 U.S. at 679.
7 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do
8 not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not crossed the line from
9 conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.
10 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings drafted
11 by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal
12 construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

13 Federal courts are courts of limited jurisdiction and possess only that power authorized by
14 the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004). Pursuant to 28 U.S.C.
15 § 1331, federal courts have original jurisdiction over “all civil actions arising under the
16 Constitution, laws, or treaties of the United States.” Cases “arise under” federal law either when
17 federal law creates the cause of action or where the vindication of a right under state law
18 necessarily turns on the construction of federal law. *Republican Party of Guam v. Gutierrez*, 277
19 F.3d 1086, 1088-89 (9th Cir. 2002). Whether federal-question jurisdiction exists is based on the
20 “well-pleaded complaint rule,” which provides that “federal jurisdiction exists only when a federal
21 question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar, Inc.*
22 *v. Williams*, 482 U.S. 386, 392 (1987).

23 Plaintiff again attempts to bring claims under Title VII of the Civil Rights Act of 1964 and
24 the Age Discrimination in Employment Act of 1967. *See* Amended Complaint. (ECF No. 6).
25 Claims under both statutes invoke the Court’s federal jurisdiction. However, he fails to attach the
26 dismissal and right to sue notice that he claims was issued by the EEOC on August 23, 2018.
27 Nevertheless, even assuming his Plaintiff’s employment discrimination complaint pursuant to
28

1 Title VII and the ADEA is timely, the fatal flaw in the Amended Complaint is it completely lacks
2 sufficient factual allegations to state a claim.

3 In order to state a Title VII discrimination claim, Plaintiff must allege that: (a) he belonged
4 to a protected class; (b) he was qualified for his job; (c) he was subjected to an adverse employment
5 action; and (d) similarly situated employees not in his protected class received more favorable
6 treatment. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir.2006) (citing *Kang v. U. Lim Am., Inc.*, 296
7 F.3d 810, 818 (9th Cir.2002)). See 42 U.S.C. § 2000e-3(e).

8 In order to state a failure-to-hire/promote disparate treatment claim under the ADEA,
9 Plaintiff must allege: (a) that he is a member of a protected class; (b) he was qualified for the
10 position; (c) despite his qualifications, he was denied the position; and (d) subsequently, the
11 position was filled by someone younger than Plaintiff. *See generally McDonnell Douglas*, 411
12 U.S. 792, 802 (1973); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

13 It is not clear whether Plaintiff was qualified for the position he was seeking and that
14 similarly situated applicants not in his protected class received more favorable treatment in the
15 hiring process. Moreover, yet again, Plaintiff's Amended Complaint seeks to state claims against
16 two individual defendants. There is no individual liability for discrimination under federal law.
17 *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583 (9th Cir. 1993) (holding individual defendants
18 cannot be liable for damages under Title VII and ADEA). Rather, Plaintiff may only bring suit
19 against the employer entity, who may be found liable for the actions of its employees under the
20 respondeat superior theory of liability.

21 For the reasons stated above, the Amended Complaint does not state a claim for which
22 relief can be granted under either Title VII or the ADEA. Although it is not clear that the
23 deficiencies identified can be cured, the Court will allow Plaintiff an opportunity to file a second
24 amended complaint to the extent he believes that he can state a claim.

25 Accordingly, **IT IS ORDERED** that:

26 1. The Amended Complaint is **DISMISSED WITHOUT PREJUDICE** providing
27 Plaintiff with leave to amend. Plaintiff will have until **January 21, 2020**, to file an
28 amended complaint, if the noted deficiencies can be corrected. If Plaintiff chooses to

amend the complaint, Plaintiff is informed that the Court cannot refer to a prior pleading (i.e., the original complaint) in order to make the amended complaint complete. This is because, as a general rule, an amended complaint supersedes the original complaint. Local Rule 15-1(a) requires that an amended complaint be complete in itself without reference to any prior pleading. Once a plaintiff files an amended complaint, the original complaint no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each Defendant must be sufficiently alleged.

2. Failure to comply with this order will result in the recommended dismissal of this case.

IT IS SO ORDERED.

Dated: December 27, 2019



DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE